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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 73

NICK FALBO,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF *AMICUS CURIAE*

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Statement

Over two thousand young men claiming to be conscientious objectors, half of them like the petitioner being also Jehovah's Witnesses, have been imprisoned on criminal charges arising out of their refusal of draft service.[1] But much more extraordinary than this imprisonment for conscience is the fact that these men were convicted and imprisoned *without a day in court*, because of a procedural rule which was applied to prevent them from interposing any defense.[2]

1. New York Times, August 27, 1943.

2. See *United States* v. *Grieme*, 128 Fed. 2d. 811, relied upon by the court below in upholding the conviction of petitioner after his defense had been excluded.

Unless this court strikes down that rule of law as it has been applied here, conscientious objectors will continue to be convicted and imprisoned without the trial at law, the day in court, which has until now been regarded by the courts as the inalienable right of every citizen. The court is thus confronted in this case with the wholesale destruction of civil rights for an unpopular minority, which is of such far-reaching importance that permission to file this brief, *amicus curiae,* has been asked by the National Committee on Conscientious Objectors of the American Civil Liberties Union.

The Facts

Since a complete statement of the facts may be found in the brief filed by counsel for the petitioner, suffice it to state here that the petitioner registered under the Selective Training and Service Act of 1940 but claimed exemption from military service both as a minister, being a member of the sect known as Jehovah's Witnesses, and as a conscientious objector; he was classified in Class IV-E as a conscientious objector and ordered to report to work assigned to men of that class; this he refused to do, claiming that the classification and order to report were erroneous and illegal on the ground that he was entitled to exemption from any service whatever as a minister of religion; he was indicted, pleaded not guilty, was "tried", convicted, and sentenced to five years' imprisonment; at the so-called trial the court excluded evidence offered by the petitioner to show that he was a duly ordained and acting minister of religion and charged the jury that the action of the draft boards in denying this claim was not subject to judicial review, even in a crim-

inal case, whereupon the jury promptly found the petitioner guilty.[3]

ARGUMENT

The court below erred in holding that errors of fact and law committed by the draft boards were not available as a defense to an indictment charging refusal to report for service under the Selective Training and Service Act of 1940.

The sole point raised in this brief relates to the ruling made by the trial court and sustained in the Circuit Court of Appeals which prevented the petitioner from asserting his defense, namely, that the draft boards in denying his claim to exemption as a minister, committed an error of law in their construction of the statutory provision for exemption, and made an arbitrary, capricious and unreasonable finding of fact, which rendered the order to report to work, which he admitted having disobeyed, illegal and void.

A. Analysis of the Circuit Court Cases

The Circuit Court of Appeals in the decision here reviewed[4] gave no reason for its ruling other than to refer to *United States* v. *Grieme*, decided by the Circuit Court of Appeals for the Third Circuit in June, 1942.[5] The *Grieme* case was the first case in which appeared the rule that one who had refused induction claiming that he had been illegally classified could not challenge the validity of classification or induction in a criminal prosecution

3. R. 40-60.
4. 135 Fed. 2d. 464.
5. 128 Fed. 21. 811.

resulting from his refusal to be inducted. In that case, as here, the defendant had claimed to be entitled to exemption as a minister, but was nevertheless classified as available for work as a conscientious objector, which he refused by not reporting for such work. The trial judge excluded the evidence offered by the defendant to show that he was illegally classified, and charged the jury that they could not consider whether the draft board acted properly, as this was irrelevant. After referring to the line of cases holding that decisions of draft boards are final unless they fail to give a fair hearing, act contrary to law, or make decisions which are arbitrary, capricious and unreasonable, the court without any citation of authority concluded:[6]

> "We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts. The court below therefore properly excluded the matter proffered in defense by the present appellants."

The court overlooks the fact that if the orders were unlawful, then the defendants committed no "dereliction". Furthermore, they cannot be criticised for attacking the orders collaterally, since no direct attack on such orders is allowed by the draft law, which contains no provision

6. 128 Fed. 2d 811 at 815.

for judicial review. Habeas corpus, which the court sanctions for review of draft orders, is as much a collateral attack as an attack made in defense to an indictment. Thus both the reasons given by the court for its decision, and it gave no others, are based on fallacious reasoning.

The same court a few months later decided a similar case, *United States* v. *Bowles*,[7] involving this time a conscientious objector who had refused to report for induction after a classification by the appeal board which was plainly contrary to law, in that the test of conscientious objection contained in the 1917 draft law rather than the present law was applied. Conceding that the case disclosed, upon the defendant's allegations, a gross violation of his rights, the court followed the precedent of its earlier decision in the *Grieme* case, adding that by continuing the jurisdiction of the civil authorities over drafted men until inducted, Congress may have unintentionally deprived of any judicial review persons who are conscientiously unable to submit to induction, but if so their remedy lies in legislative action or executive clemency.[8] This explanation explains nothing except the harshness of the rule applied. The provision of the law,[9] unlike the 1917 law, that civil jurisdiction remains until induction surely does not *reduce* the jurisdiction of the civil authorities!

Perhaps because of the precedent of these cases, the Circuit Court of Appeals for the Second Circuit reached the same result in *United States* v. *Kauten*,[10] also involving a conscientious objector who had refused induction claiming that he had been illegally denied exemption from

7. 131 Fed. 2d. 818, affirmed on other grounds, 319 U. S. 33.
8. 131 Fed. 2d. 818, at page 819.
9. Selective Training and Service Act of 1940, section 11.
10. 133 Fed. 2d. 703.

military service by reason of a narrow and erroneous construction by the draft boards of the requirement of the statute[11] that the objection stem from "religious training and belief." The Court held that such a defense was properly excluded by the Trial Judge, but for somewhat different reasons from those advanced in the *Grieme* and *Bowles* cases:[12]

> "Even though the Local Draft and Appeal Boards may have committed an error of law in classifying a conscientious objector as a man available for combat service his rights under Section 5 (g) are not abridged in any practical sense until he is subjected to military 'training and service' after formal induction into the Army. Prior to that time he has suffered only the inconvenience incident to his status as a party to an administrative proceeding—the general sort of inconvenience to which parties customarily submit in proceedings before the Interstate Commerce Commission, National Labor Relations Board, and many other federal and state tribunals including courts of law. The justification for the burden upon the individual of subjecting him to such proceedings instead of stopping them at the outset by injunctive or other relief in the courts lies in the absence of an alternative consistent with the orderly conduct of the government's business, and in this particular case, in the want of any suitable alternative method of selecting the personnel of a large Army. On such grounds the Supreme Court in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, denied relief to an employer seeking to escape the burden of a National Labor Relations Board proceeding because its business was not in interstate or foreign commerce and because the holding of the hearings

11. Section 5g, Selective Training and Service Act of 1940.
12. 133 Fed. 2d. 703 at 706.

would cause damage due to the incidental expense, inconvenience and impairment of its goodwill and of harmonious relations with its employees. The decision of the same court on January 11, 1943, in *Endicott Johnson Corp.* v. *Perkins*, is to a like effect. See also *Fed. Power Comm'n* v. *Edison*, 304 U. S. 375, 384; *United States* v. *Illinois Central R. Co.*, 244 U. S. 82. Indeed it has become the general rule that where Congress has delegated to an administrative authority a certain field of governmental activity and made its acts final, the courts will not interfere until the administrative proceedings have been concluded and any administrative remedy that may exist has been exhausted. Under this rule there would seem to have been no good reason for interrupting proceedings leading to induction until some substantial physical restraint occurred. Then the writ of habeas corpus is sufficient to remedy any irregularities of Draft Boards and to satisfy all reasonable scruples on the part of inductees. Moreover, it is the practice of the Army to grant a furlough of seven days after a registrant is formally inducted before he is subjected to military training. This gives him time to apply for a writ of habeas corpus without disturbing the selective service machinery, if he thinks that his rights as a conscientious objector have been infringed.

It results from the foregoing that the registrant was bound to obey the order to report for induction even if there had been error of law in his classification. The Administrative Board had jurisdiction of his case and its order could not be wilfully disregarded."

The wisdom of applying this rule of administrative procedure, a rule of convenience, to a criminal case where it has the tragic effect of denying the defendant the right to make a defense is open to serious question. This will

be discussed hereafter. But it should be noticed that even if the rule is applicable to criminal cases of this sort, it is not controlling here. The Court says in the *Kauten* opinion that the rule protecting administrative decisions from attack applies for three reasons: (1) because the orderly conduct of the Government's business requires it, (2) because the administrative proceeding is not ended until after induction, and (3) because the writ of habeas corpus available after induction is sufficient to satisfy all reasonable scruples of inductees.

Each one of these reasons is based on false assumptions of facts which the court could judicially notice but which it apparently did not fully understand. (1) The draft process would not become less orderly if courts are to allow a man accused of crime to defend himself by challenging the validity of his draft classification, for the simple reason that exceedingly few men prefer the risk of criminal prosecution to the unpleasantness of being drafted, as shown by the government's own figures on draft violations.[13] (2) The administrative process does not remain open until induction is completed. When the order to report for induction is issued, the Selective Service authorities close their files. The induction itself is handled by the military establishment. The administrative process, then, is ended just prior to induction with the issuance of an order to report to the military authorities for examination and induction. The refusal upon which the indictment was based occurred *after* this order was issued and, therefore, *after the administrative process ended*, and so could not, as the court feared, interrupt the administrative process. (3) All reasonable scruples of inductees are not satisfied by the availability of habeas

13. New York Times, August 27, 1943.

corpus to question the classification, after induction, unless it can be said that the two thousand who preferred prison to induction were all unreasonable, and only the two or three were reasonable who were willing to swallow their scruples for the time being and accept induction with the risk of court martial and long imprisonment or sentence of death.[14]

One of these two or three who had the temerity to risk court martial for the sake of getting the only judicial review vouchsafed by the courts was the subject of the decision of the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Phillips* v. *Downer*.[15] Here the court approved the granting of review by habeas corpus to one who submitted to induction for the purpose of getting such review and thereafter refused to recognize the jurisdiction of the army over him or to obey any military commands. The castigation which this conscientious objector received at an army camp, not to mention his confinement in the guard house and the threat of court martial, although as it turned out the court found him to have been illegally classified, are sufficient to demonstrate why this method of review is insufficient for all but a hardy few, and why two thousand have preferred imprisonment.[16]

The other cases add little or nothing to the reasoning of the *Grieme, Bowles* and *Kauten* opinions, although exhibiting varying degrees of disagreement therewith.[17]

We realize that the present case deals only with a refusal to go to a civilian public service camp on the part

14. See Article 64, Articles of War, 10 U.S.C. section 1536.

15. 135 Fed. 2d. 521, decided May 7, 1943.

16. See Chapter 7, *The Conscientious Objector and the Law*, by Julien Cornell, The John Day Company, New York, 1943.

17. *Baxley* v. *United States*, 134 Fed. 2d. 998, *Goff* v. *United States*, 135 Fed. 2d. 610, *Rase* v. *United States*, 129 Fed. 2d. 204, *Johnson* v. *United States*, 126 Fed. 2d. 242.

of a registrant claiming exemption from any sort of service on the claim of being a minister. Although we have discussed the case of a registrant refusing induction on the ground of being a conscientious objector, we feel that the principles discussed there are applicable to the case at bar.

In both types of cases submission to the order of the draft board involves the doing of an act which is the basis for the registrant's refusal and inability to obey because of conscientious scruples.

B. Errors in the administrative proceeding upon which a criminal charge is based should be available as a defense.

With the growth of administrative law, and the increasing judicial functions of administrative bodies, has arisen the necessity of protecting the administrative board from being hampered in its work by resort of litigants to the courts. Therefore, as brought out in the *Kauten* opinion quoted above, the courts will not interfere with administrative proceedings by injunction or other collateral attack, as this would hopelessly disrupt the orderly functioning of administrative boards.

This rule, heretofore confined to civil proceedings, has here been applied to prevent a man accused of crime from asserting in his defense that the administrative order which he violated was invalid. Thus the petitioner here was denied the fundamental right of a fair trial, indeed he had no trial at all as he was unable to present his only defense. As the petitioner has argued at length in his brief, the action of the trial judge in excluding the defense runs contrary to the conception of fair trial which is one of the cardinal tenets of Anglo-American jurisprudence. Whatever short cuts may be necessary to pre-

mote justice in civil litigation, the law has never allowed the rights of defendants in criminal trials to be whittled away for the sake of clearing the court's calendar, or speeding the work of administrative boards, or for any other reason.

The net result of this procedure is to permit administrative agencies to find men guilty of crime, the courts becoming mere rubber stamps. This is especially pernicious when it is realized that the hearings held by the draft boards on conscientious objectors do not approach the requirements of due process. The hearing is based on a secret investigation by the Federal Bureau of Investigation, so that the accused is not confronted by the evidence or the witnesses against him, he is denied the right of counsel, he is judged by a single hearing officer at a private hearing, this judgment is then passed upon by an appeal board which does not even see the registrant or the minutes of the hearing or the report of the F. B. I.[18] After such a hearing the conscientious objector is told that he may have no review in the courts except upon the intolerable condition that he submit to induction. The same is true, *mutatis mutandis*, of those who claim exemption as ministers of religion. This comes close to the gestapo methods which are so revolting to Americans.

The right of the accused in a criminal case to a fair trial is protected by the Constitution,[19] and has always been zealously guarded. It includes the right to present all defenses which the accused may possess.[20] If an exception is now to be carved out of the rights of the accused,

18. See "The Conscientious Objector and the Law" by Julien Cornell, John Day Co., 1943, pages 26, 27.

19. Amendment VI.

20. See *Edwards* v. *U. S.*, 312 U. S. 473, 482 where the court said: "The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

there should be not only a good reason but a compelling reason for so doing.

The only plausible reason advanced by the government for excluding the defense offered here is that the administrative order cannot be reviewed in such cases as this without thereby disrupting the draft process. As against the feared disruption of orderly processes of government which might result from such review, the court in the *Kauten* case, *supra*, weighed the inconvenience resulting to the defendant. Such a balancing of equities, while it may be necessary in civil controversies where a rule of reasonableness is often applied,[21] should have no application to a criminal trial where the defendant must be proved guilty beyond a reasonable doubt. But even if human freedom can be weighed in the balance against the convenience of administrative processes, still the government's argument is not sound.

The denial to the petitioner and two thousand others like him of any opportunity to present a defense has had but one effect, the imprisonment of these men without court consideration of the errors which may have occurred in the administrative process. The orderly operation of the draft has not been promoted, since whether or not the courts will hear them, these men would not consent to being drafted. What difference does it make to the draft authorities then, whether the petitioner is allowed to assert his defense or not? He is not available to the draft in either case, since he acts on the basis of moral and religious principles which are superior to his personal well being, and prefers prison rather than violate his scruples.

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21. See *U. S. v. The Associated Press*, Fed. Supp. , New York Times, October 7, 1943, page 16, cols. 4, 5.

The only way to avoid such unconscionable results, the only way to put an end to rule by bureaucratic fiat and to restore the rule of law in these cases, is by protecting the right of the conscientious objector or minister accused of crime to assert errors of draft boards in his defense to a criminal charge of a violation of the Selective Service Act.

Respectfully submitted,

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